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In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

A federal statute initially enacted in 1924 provides that veterans injured as the result of treatment at hospitals operated by the Department of Veterans Affairs are, in some circumstances, entitled to disability compensation as though their medical injuries were service-connected. For at least 60 years, VA regulations have uniformly construed this statute to provide for compensation only where there is a showing of fault on the part of the VA or of a medical "accident." The question in this case is whether the Court of Appeals for the Federal Circuit erred in refusing to defer to this longstanding administrative construction and in holding, instead, that the statute creates liability without fault.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 5 F.3d 1456. The opinion of the Court of Veterans Appeals (Pet. App. 22a-30a) is reported at 1 Vet. App. 584. The opinion of the Board of Veterans' Appeals (Pet. App. 32a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. On December 6, 1993, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 11, 1994. The petition was filed on that date and was granted on

April 4, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 38 U.S.C. 1151 (Supp. IV 1992) provides as follows:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary [of Veterans Affairs], or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of

> such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

2. The current regulation implementing Section 1151, 38 C.F.R. 3.358, provides in part as follows:

> (a) *General.* Where it is determined that there is additional disability resulting from a disease or injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, compensation will be payable for such additional disability.
>
> (b) *Additional disability.* In determining that additional disability exists, the following considerations will govern:
>
> (1) The beneficiary's physical condition immediately prior to the disease or injury on which the claim for compensation is based will be compared with the subsequent physical condition resulting from the disease or injury, each body part involved being considered separately.
>
> (i) As applied to examinations, the physical condition prior to the disease or injury will be the condition at time of beginning the physical examination as a result of which the disease or injury was sustained.
>
> (ii) As applied to medical or surgical treatment, the physical condition prior to the disease or injury will be the condition which the specific

medical or surgical treatment was designed to relieve.

(2) Compensation will not be payable under 38 U.S.C. 1151 for the continuance or natural progress of disease or injuries for which the training, or hospitalization, etc., was authorized.

(c) *Cause.* In determining whether such additional disability resulted from a disease or an injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such disease or injury or an aggravation of an existing disease or injury and not merely coincidental therewith.

(2) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from disease or injury or an aggravation of an existing disease or injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(3) Compensation is not payable for either the contemplated or foreseeable after[-]results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or

similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

3. Section 31 of the Act of Mar. 28, 1934, ch. 102, Tit. III, 48 Stat. 526, formerly codified at 38 U.S.C. 501a (1952), provided as follows (before its repeal by the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, § 2202(132), 71 Stat. 168):

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred,

or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

4. Section 213 of the World War Veterans' Act, 1924, ch. 320, 43 Stat. 623, provided as follows (before its repeal by the Act of Mar. 20, 1933, ch. 3, Tit. I, § 17, 48 Stat. 11):

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916; and from any payments due hereunder shall be deducted all amounts paid by any person other than [the] United States as damages or compensation for such injury, aggravation, or death: *Provided*,

> That application be made for such benefits within one year after such injury or aggravation was suffered or such death occurred or after the passage of this Act or whichever is the latest date.

5. VA Regulation Nos. 137 (June 11, 1926), 157 (Sept. 15, 1926) and 167 (Feb. 21, 1927) and VA Regulations & Procedure §§ R-1120 through R-1122 (1930) are reprinted in pertinent part at App., *infra*, 1a-10a.

STATEMENT

Respondent served on active duty with the United States armed forces from April, 1953, to January, 1955. Pet. App. 33a. In 1986 respondent was admitted to a hospital operated by the Department of Veterans Affairs (VA)[1] for evaluation and treatment of pain in his legs. *Ibid.* The condition for which respondent sought treatment was not connected in any way to his prior military service.[2] See *id.* at 2a. VA physicians correctly diagnosed a herniated disc, and after other treatments failed they performed surgery to remove the disc. *Ibid.*

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[1] We follow the court of appeals (Pet. App. 2a n.1) in referring to the Department and its predecessors, the Veterans' Administration and the Veterans' Bureau, collectively as the VA.

[2] Veterans with non-service-connected conditions are eligible for VA medical care based on criteria such as availability of VA facilities, ability to pay, and whether the veteran also has a service-connected condition. Respondent was entitled to VA care for his non-service-connected back condition under what was then 38 U.S.C. 610(a) (1982), now recodified at 38 U.S.C. 1710(a) (Supp. IV 1992).

Although respondent's surgery was successful in removing the herniated disc, respondent subsequently experienced problems with his left calf, ankle and foot. Pet. App. 34a-35a. Asserting that those problems resulted from the surgery, respondent filed a claim for disability benefits under what is now 38 U.S.C. 1151 (Supp. IV 1992) (previously codified at 38 U.S.C. 351 (1988)). That statute provides that additional disability resulting from "an injury, or an aggravation of an injury, [suffered] as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary" will be treated as though it were "service-connected," thus making the veteran eligible for a variety of medical, disability and other benefits.[3]

The VA's regional office denied respondent's claim for disability benefits (see Pet. App. 2a), and the Department's Board of Veterans' Appeals affirmed. *Id.* at 32a-40a. After reviewing the medical evidence (*id.* at 33a-35a), the Board pointed out (*id.* at 36a) that under Section 3.358(c)(3) of the Department's regulations, a disability will be treated as compensable under Section 1151 only if it "proximately resulted

[3] Although the phrase "additional disability" suggests that Section 1151 was drafted to deal with incremental disabilities to veterans already suffering from service-connected injuries, as a practical matter the interpretive issue before the Court is important primarily for claims, like respondent's, based on disabilities resulting from care provided for *non*-service-connected conditions. Additional disabilities resulting from care provided by VA for service-connected conditions are generally compensable, either under Section 1151 (where the veteran can show fault) or under other statutory and regulatory provisions. See 38 U.S.C. 1110, 1131 (Supp. IV 1992); 38 C.F.R. 3.310(a).

[from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA, or from the occurrence of an "accident," defined in the regulation as "an unforeseen, untoward event." 38 C.F.R. 3.358(c)(3).[4] Reviewing the evidence in light of that standard, the Board found (Pet. App. 37a) no "indication that treatment afforded [respondent] was in any way negligent, or at variance with sound medical practice, or was otherwise at fault." Similarly, the Board found no "untoward result in the sense contemplated by the law and regulation." *Ibid.*; see also *id.* at 38a-39a. Rather, the Board concluded that the problem respondent was experiencing with his foot was "a common, foreseeable result of such surgery." *Id.* at 37a. Finally, the Board found (*id.* at 37a-38a) that respondent had demonstrated no post-operative increase in the preexisting (*id.* at 35a, 38a) weakness of his left ankle, and that any calf and ankle weakness were caused by that condition and were "not in any way related to the [surgery]." The Board therefore denied respondent's claim.

[4] The VA once interpreted the "unforeseeability" aspect of this definition of "accident" so as to exclude "contemplated risks of surgery, no matter how remote." See V.A. Gen. Coun. Op. 2-78, at 5 (1978) (J.A. 11, 22). In December, 1990, however, the VA adopted a somewhat broader construction, treating as "accidental" those consequences of medical or surgical care that are "not *reasonably* foreseeable." V.A. Gen. Coun. Op. 99-90, at 10 (1990) (J.A. 30, 42). The current administrative interpretation thus excludes from compensation only the natural worsening of a veteran's original condition (*i.e.*, a condition not arising out of VA treatment) and the contemplated or reasonably foreseeable consequences of careful medical treatment.

The Court of Veterans Appeals reversed. Pet. App. 22a-30a. It held that the statute itself neither imposed nor authorized the fault-or-accident requirement invoked by the Board under Section 3.358(c)(3) of the regulations.[5] The court reasoned (Pet. App. 25a-27a) that the statute's plain language imposed no fault requirement, and that a no-fault construction was plausible and would not lead to absurd results. The court rejected (*id.* at 28a-30a) the Secretary's arguments that the legislative history demonstrated an intent to provide compensation only in cases of fault or accident, that repeated congressional reenactment or amendment of the statutory language had ratified the Secretary's longstanding regulatory interpretation, and that the Secretary's construction was entitled to deference. The court therefore invalidated Section 3.358(c)(3) as inconsistent with the statute. Pet. App. 30a. Because the Board had relied in part on Section 3.358(c)(3) in reaching its decision, the court remanded the case for a redetermination of respondent's claim without reference to that provision.

The Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-21a. That court reasoned, as had the Court of Veterans Appeals, that the plain language of the statute lacked a fault or accident element; it rejected the Secretary's contention that the statutory language referring to injuries suffered

[5] Respondent, acting *pro se*, did not raise the issue whether Section 3.358(c)(3) represented a permissible interpretation of the governing statute. The Court of Veterans Appeals *sua sponte* ordered supplemental briefing on that issue, and appointed respondent's present counsel to brief and argue the issue as *amicus curiae* on behalf of respondent. See C.A. App. 9 (3/15/91 docket entry).

"as the result of" VA care was at least ambiguous on that point. *Id.* at 4a-9a. It undertook (*id.* at 9a-18a) an extensive review of the history of the statute's original enactment, reenactment, and regulatory interpretation, and concluded (*id.* at 18a) that the Secretary had failed to make the "extraordinarily strong showing of clear legislative intent" (*id.* at 9a) necessary to convince it to depart from what it viewed as the clear language of the statute. The court declined to defer to the Secretary's interpretation of the statute on the grounds that the statutory language was clear, the regulatory interpretation was not contemporaneous with the original enactment of the statute, and the regulation's long history was not highly probative in light of the fact that VA regulations did not become subject to judicial review until the creation of the Court of Veterans Appeals in 1988. *Id.* at 18a-20a. Finally, the court rejected (*id.* at 20a-21a) the Secretary's argument that Congress had ratified the VA's interpretation by reenacting the statute, and amending it in related ways, after the regulation in question had become well-established.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1151 provides that "[w]here any veteran shall have suffered an injury, or an aggravation of an injury, as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary, * * * and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran," the VA will pay compensation for the incremental disability

or death in the same manner as if it were service-connected. 38 U.S.C. 1151 (Supp. IV 1992).

The court of appeals' decision in this case rests primarily on what the court deemed to be the plain language of the statute: in the court's view, the statute "unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment." Pet. App. 9a. That conclusion, however, ignores ambiguity inherent in the statutory language. Moreover, the court of appeals disregarded the significance of the context and history of the provision. When first enacted in 1924, and when repealed and reenacted ten years later in the midst of the Great Depression, Section 1151 was viewed as a minor adjunct to the provision of medical care for already disabled veterans. The court of appeals' construction, however, would treat the statute as a major expansion of governmental liability for VA medical treatment well beyond prevailing common-law norms. In addition, the court's broad interpretation ignores more than sixty years of narrow construction by the agency charged with administration of the statute, and substantial evidence of congressional ratification of and acquiescence in that agency construction.

Appropriate use of the "traditional tools of statutory construction" thus makes clear that, contrary to the court of appeals' decision, the question in this case cannot be finally resolved simply by reference to the statutory text. *Chevron U.S.A. Inc.* v. *Natural Resources Defence Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984). In those circumstances, the court of appeals should have deferred to the VA's reasonable,

contemporaneous and longstanding construction of the statute.

ARGUMENT

I. THE SECRETARY'S LONGSTANDING INTERPRETATION OF SECTION 1151 RESTS ON A PERMISSIBLE CONSTRUCTION OF THE STATUTORY LANGUAGE

The court of appeals found that the language of 38 U.S.C. 1151 (Supp. IV 1992) "unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment." Pet. App. 9a. That conclusion ignores important ambiguities in the statutory text.

A. First, Section 1151 applies to veterans who have "suffered an injury" as the result of VA medical care. While the most general definition of the term "injury" is any "hurt, damage, or loss sustained," the word is also used to refer more specifically to "an unjust or undeserved infliction of suffering or harm," or in its legal sense to a "violation of another's rights for which the law allows an action." *Webster's Third New International Dictionary* 1164 (1986).[6] Com-

[6] See also I *The New Shorter Oxford English Dictionary* 1371 (1993) (giving, as the primary definition of "injury," "wrongful action or treatment; violation or infringement of another's rights; suffering wilfully inflicted; a wrongful act; a wrong inflicted or suffered"); 2 *Bouvier's Law Dictionary* 1580-1581 (3d rev. 1914) ("A wrong or tort"; "Any legal wrong which will give a cause of action to the one whose rights, person or property are injured thereby"; "the wrongful act or tort which causes loss or harm to another"); 3 Blackstone, *Commentaries* 122 (1772) ("Injuries, affecting a man's *health*, are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution. As

mon usage also frequently associates the term "injury" with the intentional, accidental or negligent infliction of harm. Thus, even as a general matter the word "injury," as used in Section 1151, could well include some connotation of fault or of an "unforeseen, untoward event." 38 C.F.R. 3.358(c)(3). In the particular context of medical "injuries," that connotation is not only possible but likely.[7] See *People* v. *Superior Court*, 252 Cal. Rptr. 335, 341 (Cal. Ct. App. 1988) ("A commonsense interpretation of 'injury' as used in this section [imposing criminal penalties on persons causing or permitting adult dependents to be "injured"], applies not to injuries such as would be inflicted on a patient by a medical care practitioner using ordinary care in the course of treatment, but applies to nontherapeutic conduct or gross, reckless

* * * by the neglect or unskillful management of his physician, surgeon, or apothecary.").

[7] *Urie* v. *Thompson*, 337 U.S. 163, 180-187 (1949), is not to the contrary. In *Urie*, this Court interpreted the word "injury" as used in the Federal Employers' Liability Act (FELA) to encompass occupational diseases arising from employer negligence, whether or not their occurrence could be described as "accidental." *Urie* emphasized, however, that FELA was a negligence statute, and held only that "the incurring of a disease or harm to health" could be an "injury" in a context where, as at common law or under FELA, "the other elements of liability for tort are present." 337 U.S. at 182. That holding is fully consistent with the VA's reading of Section 1151. Moreover, *Urie*'s emphasis on the common-law background of the statute is instructive. In the case of medical "injuries," the common law has always required proof of fault before allowing recovery. See pages 19-20, *infra*.

or culpable departures from the ordinary standard of care.").[8]

Moreover, we do not understand either respondent or the court of appeals to suggest that Section 1151 requires compensation for disabilities necessarily resulting from completely appropriate and careful

[8] Section 1151 also provides benefits for any veteran who suffers "an aggravation of an injury" as a result of VA treatment. 38 U.S.C. 1151 (Supp. IV 1992). That use of the term "injury" relates to the veteran's condition prior to treatment, and thus has little relevance to what sort of showing must be made before an "injury" or "aggravation" caused by later medical treatment will require compensation by the VA. Cf. 38 U.S.C. 1153 (Supp. IV 1992) (service-connected aggravation of pre-service "injury"). The fact that veterans who are treated for service-connected conditions are compensated, under Section 1151 and other provisions, for resulting disabilities whether or not they can show fault (see note 3, *supra*) is similarly explained by the origin of the treated condition. The basic premise of compensation for service-connected disabilities is that the government will assume responsibility for conditions contracted by service members "in line of duty." In defining what constitutes the "line of duty," Congress has generally required only a temporal relationship between duty status and the onset of a condition. See 38 U.S.C. 105 (1988 & Supp. IV 1992). Compensation under Section 1151, on the other hand, is not based on a general assumption of national responsibility for the veteran's underlying condition, but on some specific connection between treatment rendered by the VA and a post-treatment disability. It is not surprising that Congress would require a showing of fault or "accident" before assuming responsibility for the latter class of cases. Cf. Administrator of Veterans' Affairs Ann. Rep. 1-3, 8-9 (1933) (emphasizing differentiation between service-connected and non-service-connected disabilities in implementing cost-saving measures due to economic crisis) (*quoted in part at* note 21, *infra*).

medical treatment—shortness of breath, for example, resulting from removal of a diseased lung.[9] See Br. in Opp. 17 n.7. Yet such a result would presumably qualify as an "injury" within the broadest definition of that term ("hurt, damage, or loss sustained"). Thus, the dictionary by itself does not supply an unambiguously correct meaning for the term "injury" in its statutory context in this case. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992).

B. Second, to be compensable a veteran's "injury" must occur "as the result of" an activity specified in the statute, including medical treatment. 38 U.S.C. 1151 (Supp. IV 1992). The court of appeals correctly observed that under that language "the specified treatment must *cause* the injury" for which the veteran claims compensation. Pet. App. 8a. But the court passed too quickly from that statement to its conclusion (*id.* at 9a) that the statutory causation requirement includes no element of fault or unforeseeability.

It is true, as the court of appeals noted (Pet. App. 8a), that "[c]ausation and fault * * * are fundamental, distinct concepts in the law." It is equally true, however, that the law routinely recognizes the need

[9] Indeed, even an explicit proposal to replace common-law tort liability for malpractice with a "no-fault" system would have withheld compensation for harms "consistent with or reasonably to be expected as a consequence of" medical care. See P. Danzon, *Medical Malpractice: Theory, Evidence, and Public Policy* 214-215 (1985) (quoting E. Roth & P. Rosenthal, *Non Fault Based Medical Injury Compensation Systems, in* Dep't of HEW, *Report of the Secretary's Commission on Medical Malpractice* App., at 450, 460 (1973)).

for both factual and legal, or "proximate," causation. See, *e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The Secretary's regulations reflect that dual nature of the concept of causation. Under 38 C.F.R. 3.358(b), a claimant must first show factual causation by demonstrating that his or her physical condition worsened after treatment by the VA, and that the deterioration cannot be accounted for by "the continuance or natural progress of [the] disease or injuries for which" VA treatment was originally authorized. Similarly, under Section 3.358(c)(1)-(2), the claimant must show that the demonstrated deterioration is "actually the result" of treatment, "not merely coincidental therewith."[10] Finally, under Section 3.358(c)(3), the claimant must show legal causation as well—*i.e.*, that the "injury" sustained is one of the sort for which Congress intended to provide compensation.

In opposing certiorari, respondent conceded that Section 1151 would not provide benefits for an amputation necessary to remove a gangrenous leg. Br. in Opp. 17 n.7. In doing so, respondent relied on the initial cause-in-fact determinations called for by

[10] Although its opinion is not entirely clear, the Board of Veterans' Appeals found that there was no such factual causal link between at least some of respondent's complaints and his VA surgery. See pages 8-9, *supra*; Pet. App. 37a-38a. The Court of Veterans Appeals and the Federal Circuit disregarded that finding, and focused exclusively on the fault-or-accident issue under the regulations. See *id.* at 3a, 23a. If respondent prevails on that issue in this Court, on remand the Board will have the opportunity to clarify the scope of its findings with respect to factual causation.

the regulations. *Ibid.*, citing 38 C.F.R. 3.358(b)(2) and (c)(1). If respondent's view of this case rests on the "plain language" of the statute, however, it is difficult to see why the loss of an amputated leg is not, literally, "the result of * * * surgical treatment" rendered by the VA. Respondent presumably disavows that interpretation because it is exceedingly unlikely that Congress intended Section 1151 to provide disability benefits under such circumstances to a veteran whose original medical problem was unrelated to his military service. That conclusion, however, calls for employment of some limiting doctrine of legal causation.

For purposes of the necessary legal causation analysis, the VA divides adverse medical outcomes into two categories: (1) contemplated or reasonably foreseeable consequences, and (2) consequences arising from an "accident"—*i.e.*, those that were not reasonably foreseeable. 38 C.F.R. 3.358(c)(3); see note 4, *supra*.[11]. With respect to the first category, the Secretary has concluded that Congress did not intend to provide compensation when medical care is properly administered. A patient would, indeed, normally assume the risk of such foreseeable consequences of careful treatment by giving informed consent to treatment in the first place.[12] The

[11] In addition, the statute itself specifically precludes recovery where adverse consequences arise out of the claimant's own willful misconduct. 38 U.S.C. 1151 (Supp. IV 1992); 38 C.F.R. 3.358(c)(5).

[12] Failure to obtain informed consent before undertaking a medical procedure may itself constitute a failure to "properly administe[r]" care for purposes of the regulations. See 38 U.S.C. 7331 (Supp. IV 1992); 38 C.F.R. 17.34.

regulation therefore permits recovery only if a claimant can show "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA. 38 C.F.R. 3.358(c)(3). By contrast, the Secretary has concluded that unforeseeable medical "accidents" are sufficiently similar to medical malpractice to fall within the intended scope of the statute, whether or not caused by negligence.

The Secretary's approach is consistent with common experience, which teaches that "[w]henever an individual submits to surgical intervention, there are certain ill effects which may flow therefrom even though the operation is performed with the greatest possible degree of skill and precaution and no one is at fault," and that such ill effects "are contemplated risks which are anticipated as happening in a certain percentage of surgical procedures and considered the normal hazards of surgery." V.A. Gen. Coun. Op. 2-78, at 5 (1978) (J.A. 22). The Secretary's view that the statute requires legal causation is also consistent with the common law of medical malpractice, which has always provided the background for Congress's enactment, reenactment and periodic amendment of what is now Section 1151.

The no-fault standard advocated by respondent and the court of appeals, on the other hand, departs sharply from common-law principles of recovery for adverse medical outcomes. See, *e.g.*, *Ewing* v. *Goode*, 78 F. 442, 443 (C.C.S.D. Ohio 1897) (Taft, J.) ("A physician is not a warrantor of cures."); App., *infra*,

26a-28a;[13] compare *Urie* v. *Thompson*, 337 U.S. at 182. Adoption by Congress in 1924 of so radical a doctrine should not be presumed in the absence of absolutely clear evidence of congressional intent. See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879); N. Singer, *Sutherland Statutory Construction* §§ 50.01-50.05, 61.01-61.06 (5th ed. 1992). The court of appeals thought it persuasive (Pet. App. 17a) that the statute and legislative history provided no affirmative evidence that Congress intended to require claimants under what became Section 1151 to bear the "complex and difficult burden" of proving fault or accident. The court should instead have sought affirmative evidence that Congress intended to depart from the common-law norm and to relieve claimants of any burden of proof of fault—even a burden that is in fact less onerous than that routinely borne by common-law malpractice plaintiffs. See, *e.g.*, App., *infra*, 27a, 29a.

C. The court of appeals viewed the Secretary's fault-or-accident requirement as the imposition, without statutory mandate, of a new condition for liability, rather than as a reasonable interpretation of the statute's requirement that a claimant have

[13] Because it is particularly useful for purposes of this case, we have reprinted in the Appendix to this brief a memorandum from the VA's Solicitor to the Administrator dated October 24, 1935. App., *infra*, 11a-29a. Written in connection with the interpretation of the 1934 successor to Section 213 (discussed below), the memorandum discusses in some detail the early history of Section 213's interpretation by the VA. We have provided a copy of the original memorandum (which is quoted at page 27 of the Brief in Opposition) to respondent's counsel.

sustained an "injury * * * as the result of" VA care. See, *e.g.*, Pet. App. 8a. As discussed above, however, the statutory language is not so clear that it can be applied without interpretation. And, as we describe below, for more than 60 years the VA has interpreted Section 1151 and its precursors to require that a veteran show something more than the occurrence of a contemplated or reasonably foreseeable result of proper medical treatment in order to become entitled to benefits. The VA's interpretation of Section 1151 is a reasonable one that is not precluded by the "plain language" of the statute. See, *e.g.*, *National R.R. Passenger Corp.*, 112 S. Ct. at 1402 ("Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988) (opinion of Kennedy, J.); *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 980-981 (1986). In these circumstances, the Secretary's reasonable and longstanding interpretation must control, and the court of appeals erred in substituting its own interpretation for that of the Secretary. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

II. THE HISTORY OF THE STATUTE'S ENACTMENT, REENACTMENT, AND LONGSTANDING CONSISTENT APPLICATION SUPPORTS THE SECRETARY'S INTERPRETATION OF CONGRESSIONAL INTENT

Even taken by itself, therefore, the statutory language is not sufficiently unambiguous to justify the court of appeals' rejection of the Secretary's

longstanding interpretation. That conclusion is emphatically reenforced when the statute is viewed in the context of its legislative and regulatory history. See, *e.g.*, *Chevron*, 467 U.S. at 843 n.9 (directing use of "traditional tools of statutory construction" in determining whether intent of statute is clear); *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 614 (1991) (finding no ambiguity only after reviewing both text and legislative history); *Davis* v. *United States*, 495 U.S. 472, 481-485 (1990); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-439 (1986). That history, discussed below, shows that it is extremely doubtful that Congress intended, through what is now Section 1151, to enact a no-fault compensation scheme for all adverse outcomes of VA medical treatment. The issue should therefore be resolved in accordance with the Secretary's reasonable and longstanding construction of the statute.

A. The Background Of The Statute's Original Enactment Suggests A Fault Requirement

Section 1151's first precursor was enacted in 1924 as Section 213 of the World War Veterans' Act, ch. 320, 43 Stat. 623 (*reprinted at* pages 6-7, *supra*). That Act was intended in part to respond to experience gained in the first years of operation of the Veterans' Bureau, which had been established in 1921 to consolidate the administration of compensation, insurance and medical benefits previously handled by separate federal agencies. See S. Rep. No. 397, 68th Cong., 1st Sess. 1 (1924); Act of Aug. 9, 1921, ch. 57, Tit. I, 42 Stat. 147 (establishing Veterans' Bureau).

A central figure in the enactment—and the subsequent interpretation—of the 1924 Act was General

Frank Hines, who served as Director of the Veterans' Bureau from 1923 until 1945. During the extensive congressional review of the Bureau's early operations that preceded the 1924 Act, General Hines provided comments and recommendations on the numerous suggestions for improvement made by veterans' organizations. In particular, Hines endorsed a proposal that compensation should be available to veterans disabled through accidents occurring in the course of veterans' vocational training, and added that the same principle should be extended to "the hazards of medical and surgical treatment." *World War Veterans' Legislation: Hearings on Proposed Legislation (As Recommended by the Director of the United States Veterans' Bureau and American Legion, Disabled American Veterans and Veterans of Foreign Wars) Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 122-123 (1924) [*House Hearings*] (*quoted at* Pet. App. 12a-13a); see also *Investigation of Veterans' Bureau: Hearings Before the Senate Select Comm. on Investigation of Veterans' Bureau*, 67th Cong., 4th Sess. 1529 (1923) [*Select Comm. Hearings*]. In late 1923 and early 1924, General Hines consolidated his recommendations and submitted them to Congress. He recommended both that VA medical facilities should be made available to all honorably discharged veterans (rather than only to those whose medical problems were service-connected), and that compensation should be authorized not only for veterans injured "during and because of training," but also for those who were hospitalized under VA auspices and injured "as the result of accident or negligence of

treatment or unskillfulness." See, *e.g.*, *House Hearings* 113.

From the outset, then, as the court of appeals recognized (Pet. App. 10a), General Hines presented his proposal as one dealing with compensation in cases of "accident or negligence * * * or unskillfulness." *House Hearings* 113. Our review of materials from this period indicates that the sort of medical treatment cases that primarily concerned General Hines, veterans' organizations and Congress were ones in which the law at that time permitted no compensation despite a showing of fault on the part of the government. See, *e.g.*, *Select Comm. Hearings* 1514-1567; 65 Cong. Rec. 9849 (1924) (veteran blinded by VA nurse who instilled wrong substance in his eye required to pay for own glass eye); 21 V.A. Gen. Coun. Op. 2822-A (1922) (death following anesthesia for tooth extraction not compensable even if facts showed malpractice because original dental condition was not service-connected); 28 V.A. Gen. Coun. Op. 1059 (1924) (disability caused by treatment for disease originally arising from veteran's misconduct not compensable, even if facts showed VA fault); 28 V.A. Gen. Coun. Op. 1309 (1924) (veteran who died after being given chemical developer instead of barium as part of diagnostic procedure denied compensation because underlying stomach ailment was determined to be non-service-connected); see also 59 V.A. Gen. Coun. Op. 458 (1929) (citing barium case and others as motivation for recommendation to adopt Section 213).[14]

[14] Copies of opinions of the VA's General Counsel or Solicitor from this period are available through the VA law library. Because the Court of Veterans Appeals first raised the issue of Section 3.358(c)(3)'s validity *sua sponte* at appellate level (see note 5, *supra*), there was no reason or opportunity to develop a record at the administrative level on the issue now before the Court. For the convenience of the Court, we will lodge with the Clerk (and provide to respondent's counsel) photocopies of opinions cited in our briefs but not reprinted in the Appendix hereto. In addition, the VA will make original materials available for review by respondent's counsel at his request.

Moreover, perhaps because the 1924 Act was also the first to extend to veterans the benefit of medical treatment for conditions that were not service-connected, see World War Veterans' Act, 1924, ch. 320, § 202(10), 43 Stat. 620-621, the legislative history contains no discussion of the different considerations that might apply to claims arising out of treatment rendered for non-service-connected conditions, on the one hand, and to service-connected conditions (or diagnostic procedures to determine the existence of a service connection), on the other.[15] Certainly the history reflects no debate of the sort one might have expected if Congress had thought it was enacting, in complete departure from the general standards of the common law, a broad program of no-fault insurance for all adverse consequences of treatment for

[15] In 1925, Section 213 was amended specifically to include injuries incurred by veterans as a result of having submitted to diagnostic examinations. Act of Mar. 4, 1925, ch. 553, § 11, 43 Stat. 1308. The House report on the proposed amendment states that "[w]hen section 213 was originally written * * * it was intended that these cases should be covered but through some inadvertence the language was not sufficiently broad to take in these cases." H.R. Rep. No. 1518, 68th Cong., 2d Sess. 7-8 (1925). The legislative history of the amendment does not otherwise discuss the intended scope of Section 213.

veterans' non-service-connected ailments. And it is unlikely, to say the least, that the VA could have had any such result in mind when it estimated that the proposed addition of compensation for training and hospitalization mishaps, along with three other new provisions, was "not considered on a whole as involving a material increase in cost." H.R. Rep. No. 763, 68th Cong., 1st Sess. 14 (1924).

Nonetheless, as the court of appeals observed (Pet. App. 10a-13a), parts of the 1924 legislative history suggest that Congress may have contemplated compensation for disabilities caused by medical treatment even where "the doctor does the best he can * * * without neglect * * * [and] [w]ith the best medical advice." *Id.* at 11a (emphasis omitted) (quoting testimony of General Hines). Thus, as we acknowledged in our petition (at 13), it is difficult to draw any confident conclusion about the intended scope of Section 213 on the basis of the pre-enactment legislative history alone.[16]

B. The VA Contemporaneously Interpreted The 1924 Statute To Require A Showing Of Fault Or Accident

The early history of Section 213 strongly suggests that it was not implemented as a broad no-fault insurance provision. Thus, in January, 1926, General Hines appeared before a House Committee and provided statistics showing that Section 213 accounted for only seven out of the 49,204 awards made up to that

[16] See *House Hearings* 113-115, 122-123, 259-261, 272-273; *Veterans' Bureau Codification Act: Hearings on S. 2257 Before the Subcomm. of the Senate Comm. on Finance*, 68th Cong., 1st Sess. 13, 102-103, 124, 130 (1924).

time under various provisions of the 1924 Act. *World War Veterans' Legislation: Hearings on H.R. 4474 Before the House Comm. on World War Veterans' Legislation*, 69th Cong., 1st Sess. 8 (1926). Nonetheless, the scope of Section 213 occasioned discussion within the VA during the agency's first years of experience in administering the new statute.

Within two weeks of the enactment of the 1924 Act, the VA's Medical Director indicated in a memorandum to Director Hines that

> [t]he provisions of Section 213 are clear enough except that the Medical Division will assume that it is not intended to comprehend the natural progress of an injury or disease within the meaning of this section. That is, it is presumed that additional disability or death within the meaning of Section 213 would logically be based upon *some fault or error on the part of the Bureau.*

Memorandum of June 19, 1924, from Medical Director to the Director, *quoted at* App., *infra*, 14a-15a (emphasis added). Despite the Medical Director's statement, it appears that at least some early cases were in fact adjudicated by VA field offices on a no-fault basis. See App., *infra*, 15a. The Medical Director raised this issue with the Director and the General Counsel early in 1926, in part suggesting that final review of such claims should be centralized so as to prevent what it viewed as improper awards. *Ibid.* In response, the General Counsel clarified that in his opinion

> it was clearly the legislative intent to afford relief to those persons who were lawfully hospitalized

> who, as a result of such hospitalization, incurred other disabilities *through malpractice, misfeasance or malfeasance of Bureau employees.*

36 V.A. Gen. Coun. Op. 511, 511 (1926) (emphasis added), *quoted at* App., *infra*, 17a. Similarly, in an opinion rendered the following month to the manager of a regional VA office, the General Counsel considered the case of a veteran who underwent an emergency appendectomy and subsequently complained of a hernia and abdominal adhesions. 37 V.A. Gen. Coun. Op. 775 (1926). The General Counsel affirmed that the circumstances of the hospitalization could properly give rise to liability, and returned the case to the local office for further factual determinations:

> It is not believed that Section 213 of the Act as amended contemplates that conditions which might ordinarily result from an operation properly performed, *where there is no malpractice, misfeasance or malfeasance on the part of Bureau employees*, should be held to be compensable. However, as above stated, the question presented is primarily one of fact essentially of a medical nature, and is therefore not one for the determination of this office. The question should be determined in light of the rule above stated.

Id. at 776 (emphasis added).

Shortly after the issuance of these opinions—and within two years after the initial enactment of the statute—General Hines issued the first regulation interpreting Section 213. See VA Regulation No. 137 (June 11, 1926) (*reprinted at* App., *infra*, 1a-2a). Section 7701 of that regulation provided that

compensation would not be paid "for the ordinary residuals of disease or injury following accepted medical treatment," but would be paid if "additional disease or injury is the result of examination or treatment, *improperly given.*" App., *infra*, 1a (emphasis added). Shortly thereafter, General Hines promulgated Regulation No. 157 (Sept. 15, 1926) (*reprinted at* App., *infra*, 2a), amending Section 7701 to make clear that compensation would be paid "where there is satisfactory evidence of *malpractice, malfeasance, or misfeasance* on the part of the [VA]." App., *infra*, 2a (emphasis added). That regulation in turn was superseded in early 1927 by Regulation No. 167 (Feb. 21, 1927) (*reprinted at* App., *infra*, 3a-6a), Section 7701(B)(4) of which replaced the "malpractice" language with the formulation that the "usual after results of approved medical care and treatment properly administered" would not entitle a patient to compensation. App., *infra*, 5a; see also *id.* at 5a-6a (death benefits). In 1930 the regulation was reissued, without relevant change, as VA Regulations & Procedure §§ R-1120 through R-1122 (1930), *reprinted at* App., *infra*, 6a-10a.

Contrary to the court of appeals' understanding (Pet. App. 13a), in applying Regulation No. 167 (which employed the most liberal verbal standard of the early regulations) the VA did require claimants to show fault or accident in order to recover—although, then as now, a showing of "fault" for these purposes did not necessarily require proof of negligence rising to the level of malpractice. See App., *infra*, 21a-24a, 27a; 50 V.A. Gen. Coun. Op. 439, 440 (1928); 65 V.A. Gen. Coun. Op. 429, 431 (1930) ("the benefits provided by Section 213 * * * may be awarded in this case, if the

disability causing the death proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered"). In 1930 the Comptroller General expressed the same interpretation of the statute. See 9 Comp. Gen. 515, 516 (1930) ("plain intent" of Section 213 was to grant compensation in cases involving accident or fault).[17] Thus, the court of

[17] During the same period, the Attorney General issued two opinions interpreting Section 213's causation requirement in cases involving disabilities arising out of training rather than medical care. The first opinion (35 Op. Att'y Gen. 76 (1926)) considered three cases: a trainee killed in a car-train accident while returning with his instructor from an official training excursion; another killed by a car while commuting on his bicycle from his training site to his prescribed lodgings; and a third killed by the accidental discharge of a gun while on the premises of his training employer for purposes connected with the training. *Id.* at 77. The opinion stressed the statute's requirement that an injury have occurred "as the result of training," and contrasted that language with the more liberal language of workers' compensation statutes ("arising out of or in the course of the employment" or "while in the performance of duty") and of the general provision for benefits for veterans' service-connected injuries ("injury suffered or disease contracted in the Military or Naval service"). *Id.* at 78-79. It concluded that in none of the three cases had death been the proximate result of VA training within the meaning of the statute. *Id.* at 79-81. The second opinion (36 Op. Att'y Gen. 61 (1929)) softened somewhat the contrast drawn between the proximate causation requirements imposed by Section 213 and the requirements of general workers' compensation laws, and concluded that a veteran hurt by a snapping tree limb while in a car driven by his VA counselor at his prospective job site was injured "as a result of" his training for purposes of Section 213.

appeals erred in discounting the VA's construction of the statute at issue here on the ground that it was not adopted or enforced contemporaneously with enactment of the provision's original precursor. See Pet. App. 19a.

C. Congress Adopted The VA's Settled Construction When It Reenacted The Statute In 1934

The VA's interpretation of Section 213 was therefore well-established by the time that Congress repealed that Section, along with numerous other benefits provisions, as part of the Economy Act of 1933. Act of Mar. 20, 1933, ch. 3, Tit. I, § 17, 48 Stat. 11. In 1934, Congress enacted a successor provision—codified at 38 U.S.C. 501a (1952)—in substantially the same terms as the statute repealed in 1933. Act of Mar. 28, 1934, ch. 102, Tit. III, § 31, 48 Stat. 526. Congress is ordinarily presumed to be aware of established administrative and judicial interpretations of statutes that it reenacts, amends, or adapts for other purposes, and is further presumed to adopt such interpretations when it makes no relevant changes in the statutory language. *E.g.*, *Young* v. *Community Nutrition Inst.*, 476 U.S. at 983; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB*

36 Op. Att'y Gen. at 63-64. Both opinions focus on the need for proximate or "legal" (as well as factual) causation in order to bring an injured veteran within the purposes, and therefore the scope, of Section 213. They are thus consistent with the VA's interpretation of the same Section as applied to disabilities arising out of medical treatment. See also 38 C.F.R. 3.358(c)(6) (requirements for establishing proximate cause in vocational rehabilitation context); 26 V.A. Sol. Op. 343 (1936) (differentiating vocational training and medical cases for these purposes).

v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In this case, the grounds for those presumptions are strong.

The relevant congressional committees have always paid close attention to the administration of veterans' benefits. In 1930, for example, Congress effectively overruled a number of interpretations of the veterans' laws rendered by the Comptroller General, by removing the VA from the Comptroller's jurisdiction and providing that the VA Director's decisions would be conclusive as to questions of both fact and law. Act of July 3, 1930, ch. 849, § 1, 46 Stat. 991. The extensive consideration and passage of that provision suggest an intimate congressional familiarity with the administration of the veterans' laws, and a high degree of confidence in the correctness of their interpretation by the VA. See, *e.g.*, *To Amend the World War Veterans' Act, 1924: Hearings on H.R. 13174 Before the Senate Comm. on Finance*, 71st. Cong., 2d Sess. (1930); *To Amend the World War Veterans' Act, 1924: Hearings on H.R. 10381 Before a Subcomm. of the Senate Comm. on Finance*, 71st Cong., 2d Sess. (1930); S. Rep. No. 885, 71st Cong., 2d Sess. (1930); H.R. Rep. No. 874, 71st Cong., 2d Sess, (1930). Moreover, in 1930-1931 the House Committee on Invalid Pensions, which had jurisdiction over veterans' benefits issues, specifically undertook to study the existing benefits structure.[18] Similarly, in

[18] A preliminary report for the Committee's members, compiled by the Chairman, indicates the existence of serious concerns about any overly generous construction of Section 213. Thus, the report specifically criticized that Section for providing veterans with a right to compensation for the "ill-effects of * * * treatment" for non-service-connected conditions, in circumstances where "ordinary citizens could collect damages under such conditions only through expensive litigation and by producing proof, satisfactory to a court, of malpractice or malfeasance on a physician's part." House Comm. on Invalid Pensions, *A Study of Veterans' Relief: A Tentative Print of Papers Submitted for the Consideration of the Committee*, 71st Cong., 3d Sess. 107 (1931); see also *id.* at III (Chairman's Foreword), 164-165. While the language of that report could be read to assume a no-fault interpretation of Section 213, the primary contrast drawn by the study is between the relatively informal, inexpensive, and generous provisions of Section 213 and the expense and difficulty of civil malpractice litigation. That contrast is dramatic — even more dramatic, perhaps, in 1930 than today—even if the veteran must make the sort of showing of fault (short of common-law malpractice, see App., *infra*, 27a) or "accident" required by the VA, both then and now, in its administration of the statute. In any event, it is clear that in 1931 a key congressional committee was well aware of Section 213 and its application to veterans with non-service-connected conditions.

1931 the Senate directed that the VA compile all federal laws relating to veterans. S. Res. 412, 71st Cong., 3d Sess. (1931) (see 74 Cong. Rec. 2736 (1931)). The compilation included a discussion of Section 213, including references to the VA's regulations, the Comptroller General's 1930 opinion restating the fault-or-accident standard, and various VA decisions under the statute. S. Doc. No. 131, 72d Cong., 1st Sess. § 476, at 146 (1932).[19] Information relating to the VA's construction of Section 213 was therefore before

[19] A 1937 supplement to the 1932 compilation included an updated statutory citation, references to and quotations from the current regulations, and references to VA decisions rendered in the interim. VA, *Supplement I (July 21, 1932, to January 1, 1937) to Federal Laws Relating to Veterans of Wars of the United States (Annotated)* § 476.1, at 110 (1937).

Congress during its consideration of veterans' benefits legislation in the ensuing three years.

The Economy Act of 1933, passed in the midst of the Great Depression, repealed all veterans' benefits provisions, substituting a new and much less generous system. See generally 38 U.S.C. 701-723 (1934); Veterans Reg. Nos. 1-12(b), set out in note following 38 U.S.C. 723 (1934). The following year, Congress relented in part and reenacted a number of the repealed provisions, including Section 213. The legislative history of that reenactment is especially informative on the issue of fault.

As the court of appeals noted (Pet. App. 15a), the Senator who introduced the amendment restoring the benefits formerly provided under Section 213 described his proposal as covering cases where "a veteran is disabled by reason of *mistreatment* on the part of a Government agent, *as in a case of malpractice by a Government surgeon*." 78 Cong. Rec. 3289 (1934) (emphasis added) (statement of Senator Steiwer). In a portion of his statement not quoted by the court, Senator Steiwer added that "[t]here are only a limited number affected by this amendment—I think it is 65—who have suffered at the hands of [VA] physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government." *Id.* at 3290. See also *Independent Offices Appropriation Bill for 1935: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 73d Cong., 2d Sess. 117 (1934) (statement of Senator Reed). Senator Steiwer presumably relied on cost estimates provided by the VA, which indicated that the proposed reenactment

would affect 62 cases then on the rolls, at a total first-year additional cost of $25,700.[20] See 78 Cong. Rec. 3497 (1934) (Table). Those very small estimates of the scope of statutory coverage surely "brought home to the legislature" (*Thompson* v. *Clifford*, 408 F.2d 154, 164 (D.C. Cir. 1968)) the limited scope of the VA's prior administrative practice.

The 1934 Congress that enacted what became 38 U.S.C. 501a (1934) thus did so against the backdrop of an administratively well-established fault-or-accident requirement, and the Senator sponsoring the legislation stated his belief that Congress was accepting responsibility for a small group of patients injured through mistreatment or malpractice at the hands of government agents. It also acted in the midst of a nationwide economic depression.[21] Compare *FDIC* v.

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[20] Approximately $310,000 in 1993 dollars. In the year ending June 30, 1933, the VA reported admission of 66,332 World War I veterans to the VA's own hospitals for treatment of non-service-connected disabilities. Administrator of Veterans' Affairs Ann. Rep. 41 (1933).

[21] See Administrator of Veterans' Affairs Ann. Rep. 1-2 (1933) (describing background of the Economy Act):

> Faced with widespread distress among all classes of citizens and continuing general economic depression, predictions of prior years that our system of veterans' relief with its ever-widening scope and increasing rate of expenditure would require review and subsequent modification were fulfilled.
>
> * * * * *
>
> * * * With the * * * mounting costs of veterans' relief and * * * the universal experience of lean times and distress, * * * attacks upon the pension practices of our Government became increasingly substantial and vocal. These attacks * * * were * * * essentially against recog-

Philadelphia Gear Corp., 476 U.S. at 432-433 (construing Federal Deposit Insurance Act in light of its Depression origins). Given the economic crisis that precipitated Section 213's repeal by the Economy Act, the prior administrative practice, and the representation made to Congress that Senator Steiwer's amendment would restore benefits to only a "little group" of wronged veterans, it seems completely improbable that Congress intended in 1934 to enact, suddenly, a broad and costly scheme of no-fault insurance against all adverse medical outcomes—particularly one that would cover veterans whose medical problems were not service-connected.

D. The Post-1934 History Of The Statute Confirms The Validity Of The Secretary's Long-standing Construction

As the court of appeals acknowledged (Pet. App. 16a), the VA's construction of the governing statute

nizing an obligation on the part of the Government toward those veterans who, though serving, were discharged from that service without disability. * * *

* * * [T]he President and the Congress, * * * in the face of a major national emergency, found it necessary for the protection of our credit to make certain curtailments in governmental expenditures involving not only veterans' relief but other activities of the Government. * * *

* * * In our desire to aid veterans in the past, it was frankly admitted that we probably had gone too far, and that there was not that marked distinction regarding benefits paid to veterans with combat and service disabilities as against benefits flowing to those who undoubtedly were in need of help but, nevertheless, who did not claim their disabilities were due to service.

to require some showing of fault or accident as a predicate for recovery was explicitly reconfirmed in August, 1934, shortly after the enactment of 38 U.S.C. 501a. See VA Administrator's Decision No. 255, 1 Admin. Dec. V.A. 321, 323 (1934); App., *infra*, 24a, 28a. The VA has consistently maintained the same interpretation from that time through its current embodiment in 38 C.F.R. 3.358(c)(3).[22]

Congress has taken action with regard to what is now Section 1151 several times since 1934. In 1940 Congress enacted a provision that extended the same coverage to all veterans submitting to examinations in connection with benefits claims.[23] See 38 U.S.C. 501a-1 (1940). In 1943 Congress enacted provisions for vocational rehabilitation of disabled veterans of the Second World War, and included language substantially similar to that in Section 501a, conferring benefits for injuries suffered as a result of such training.[24] See 38 U.S.C. 739 note (1946) (setting forth Veterans Reg. No. 1(a), Part VII, ¶ 4). Given Congress's close attention to veterans' benefits legislation, it is safe to assume that it had full knowledge of the VA's construction of Section 501a when it expanded the effective scope of the provision on these occasions.

In 1955 President Eisenhower appointed a special commission, chaired by General Omar Bradley, "to

[22] The predecessor to the current regulation was promulgated by the VA in 1936 and was first published in the Code of Federal Regulations in 1939. See 38 C.F.R. 2.1123(c) (1939). The regulation was promulgated in substantially its current form in 1961. 26 Fed. Reg. 1590-1591 (1961).

[23] Act of Oct. 17, 1940, ch. 893, § 12, 54 Stat. 1197. See S. Rep. No. 2198, 76th Cong., 3d Sess. 12 (1940).

[24] Act of Mar. 24, 1943, ch. 22, § 2, 57 Stat. 44.

make a comprehensive survey and appraisal of the structure, scope, and administration of the laws * * * providing pension, compensation, and related nonmedical benefits to veterans and their dependents." Exec. Order No. 10,588, § 2, 3 C.F.R. 236 (1954-1958 comp.). In describing the benefits conferred by Section 501a and related provisions, the Commission's staff specifically noted that compensation was not payable "for the after-results of approved medical care properly administered, in the absence of a showing" of fault or accident. Staff of President's Comm'n on Veterans' Pensions, 84th Cong., 2d Sess., *A Report on Veterans' Benefits in the United States: Compensation for Service-Connected Disabilities* 22 (Comm. Print. 1956). In 1957 and 1958, in the wake of the Commission's report, many veterans' benefits provisions, including Sections 501a and 501a-1, were repealed, revised, compiled, and reenacted in a comprehensive new codification.[25] No substantive change whatever was made to the te ms of what had been Section 501a and became 38 U.S.C. 351 (1958).

In 1962 Congress once again acted with respect to the statute at issue, amending what was then Section 351 to remove a two-year period of limitations on claims and to provide a specific offset for amounts recovered under the Federal Tort Claims Act on account of otherwise compensable injuries; it also enacted a provision setting effective dates for certain awards under Section 351.[26] Congress made further

[25] Veterans' Benefits Act of 1957, Pub. L. No. 85-56, §§ 351 (reenactment), 2202(132) (repeal), 71 Stat. 102, 168; Act of Sept. 2, 1958, Pub. L. No. 85-857, § 1, 72 Stat. 1124.

[26] Act of Oct. 15, 1962, Pub. L. No. 87-825, §§ 1 (enacting 38 U.S.C. 3010(c)), 3, 76 Stat. 948, 950. See H.R. Rep. No. 2123, 87th Cong., 2d Sess. (1962); S. Rep. No. 2042, 87th Cong., 2d Sess. (1962).

technical amendments to the statute in 1969, 1976, 1984, and 1991, the last of which also renumbered Section 351 as the current Section 1151.[27]

Despite this repeated, and often substantive, congressional attention to the provision at issue in this case, there is absolutely no evidence of any legislative dissatisfaction with the fault-or-accident requirement that has been explicitly set out in the VA's regulations since at least 1936. See note 22, *supra*. Thus, while it is generally true, as the court of appeals remarked (Pet. App. 19a-20a), that until 1988 only Congress could alter the VA's regulatory interpretations of the statutes it was charged to administer,[28] the absence of judicial review does not in

[27] Act of June 11, 1969, Pub. L. No. 91-24, § 3, 83 Stat. 33; Veterans Disability Compensation and Survivor Benefits Act of 1976, Pub. L. No. 94-433, § 404(19), 90 Stat. 1379; Veterans' Compensation and Program Improvements Amendments of 1984, Pub. L. No. 98-223, § 213(1), 98 Stat. 46; Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, §§ 4(a)(1), 5(a), 105 Stat. 403, 406 (1991).

[28] Although 38 U.S.C. 511 (Supp. IV 1992) (formerly 38 U.S.C. 211(a) (1988)) has long precluded district court review of VA benefit determinations in most individual cases, even before 1988 courts reviewed challenges to VA regulations in certain special circumstances. See, *e.g.*, *Kirkhuff* v. *Nimmo*, 683 F.2d 544, 546-548 (D.C. Cir. 1982) (citing *Evergreen State College* v. *Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075 (8th Cir. 1979)). Courts also allowed challenges to the VA's general authority to promulgate regulations, see, *e.g.*, *Wayne State Univ.* v. *Cleland*, 590 F.2d 627 (6th Cir. 1978), and permitted review of VA benefit decisions in certain situations where the VA sought to

the least suggest any lack of authoritativeness in the VA's longstanding administrative construction. On the contrary, in light of Congress's frequent and close attention to veterans' benefits issues, one may presume with more than ordinary confidence that any significant inadequacy in the agency's construction would have been brought to Congress's attention, either by veterans themselves or by the many well-organized and sophisticated groups that represent them.[29] The courts should certainly *not* presume, in

recover funds already disbursed, see *Greenwood* v. *United States*, 858 F.2d 1056 (5th Cir. 1988). This Court has also permitted constitutional challenges to statutes governing the award of veterans' benefits. *Johnson* v. *Robison*, 415 U.S. 361 (1974).

[29] The elimination of the claims limitations period in 1962, for example, removed a significant restriction on the availability of benefits that had been in existence since the initial enactment of Section 213 in 1924. The change was supported by "[t]he four major veterans organizations." See, *e.g.*, S. Rep. No. 2042, *supra*, at 3. It is difficult to believe that in the course of considering that amendment Congress was not aware of the substantive standard applied by the VA in awarding benefits, or that the supporting veterans' organizations would not have taken the opportunity to protest if they had felt that the VA's fault-or-accident standard represented an unjustified departure from the statutory mandate. Similarly, we note that in 1953, during hearings concerning eligibility for care in VA hospitals, the National Director of Claims of the Disabled Veterans of America described for the subcommittee, accurately and without any suggestion of disapproval, the VA's interpretation of the statute as it applied to both vocational training and medical care, adding that "Service connection [established] in this manner permits the veteran full compensation rights as a protection against added disability because of training conditions or faulty medical care." *Entitlement and Eligibility of Veterans for Hospital Care and Outpatient Dental Treatment:*

the absence of affirmative evidence, that Congress intended, in 1934 or at any time thereafter, to adopt an interpretation that both differed sharply from the prevailing administrative interpretation, and would have had a dramatic financial impact on the federal budget.[30] Cf. *Lorillard* v. *Pons*, 434 U.S. at 580-581; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 274-275.

Hearings Before the Subcomm. on Hospitals of the House Comm. on Veterans' Affairs, 83d Cong., 1st Sess. 1924, 1932 (1953).

[30] The court of appeals relied on the lack of judicial review of VA regulations prior to 1988 as a reason to discount the longevity of the regulation at issue here in determining the deference due it from the courts. Pet. App. 19a-20a. As we point out in the text, however, quite the opposite is true. In any event, while there is no question that the court of appeals should subject the Secretary's regulations to conscientious review, there should also be no question that those regulations are entitled to at least the same degree of deference that guides and limits review of the regulations of other administrative agencies. Any misapprehension on this point takes on added significance because the court below has exclusive jurisdiction over challenges to the validity of the VA's regulations, 38 U.S.C. 7292(c) (Supp. IV 1992), so that in a single decision it can sweep aside longstanding administrative practice in a way that can be corrected only by this Court or by Congress. The Court should thus make clear that the VA's longstanding regulations are entitled to at least the same deference accorded similar regulations of other agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1994

APPENDIX A

1. VA Regulation No. 137, promulgated June 11, 1926, provided in pertinent part as follows:

> Sec. 7700. In accordance with the provisions of section 213, World War veterans' act, 1924, as amended, compensation is payable where any beneficiary suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational rehabilitation act, as amended, the war risk insurance act, as amended, or the World War veterans' act, as amended, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of the World War veterans' act, as amended, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to, or the death of such beneficiary.
>
> Sec. 7701. Compensation under the provisions of section 7700 will not be paid for the ordinary residuals of disease or injury following accepted medical treatment nor for the continuation of the original disability where improvement can not be effected by approved medical or surgical treatment. If an additional disease or injury is the result of examination or treatment, improperly given, compensation will be paid to the full extent of such additional disease or injury.
>
> Sec. 7702. Claims and rating boards in regional offices will make recommendatory ratings on cases coming under the provisions of section 213

of the World War veterans' act, 1924, as amended. These ratings will be forwarded together with the case file to central office for review and final rating by the rating section, awards division. The final rating and the case file will be returned to the proper regional office, and action based thereon will be taken in the field.

2. VA Regulation No. 157, promulgated September 15, 1926, modified Section 7701 of Regulation No. 137 to read in pertinent part as follows:

Sec. 7701. Compensation under the provisions of section 7700 will not be paid for any period prior to July 7, 1924. * * * Compensation will not be paid for the usual after results of approved medical or surgical treatment. When improvement of a disease or injury does not result after approved medical or surgical treatment, compensation will continue to be paid for the disability persisting from such original disease or injury, if it is service connected. But compensation will not be paid under like circumstances for persistence of disability from an original disease or injury in cases falling under section 202(10) of the World War veterans' act, 1924, as amended [authorizing medical treatment for non-service-connected conditions]. If an additional disease or injury is the result of examination or treatment, compensation will be paid to the full extent of the disability from such additional disease or injury, where there is satisfactory evidence of malpractice, malfeasance, or misfeasance on the part of the United States Veterans' Bureau.

3. VA Regulation No. 167, promulgated February 21, 1927, canceled and superseded Regulations Nos. 137 and 157 and provided in pertinent part as follows:

Sec. 7700. In accordance with the provisions of section 213, World War veterans' act, 1924, as amended, compensation is payable where any beneficiary suffers or has suffered any injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational rehabilitation act, as amended, the war risk insurance act, as amended, or the World War veterans' act, 1924, as amended, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of the World War veterans' act, as amended, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to, or the death of such beneficiary.

Sec. 7701. Disability compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined (1) that there is additional disability, and (2) that such additional disability resulted from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

A. The determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under section 213 is based with his subsequent

physical condition resulting from such injury. It being deterimined that there is additional disability and that it is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination, then compensation will be payable only for such additional disability from the date of the receipt of the injury, in accordance with the terms of the schedule of disability ratings. This comparison will be made separately for each body part involved. As applied to medical or surgical treatment, the physical condition prior to the injury will be the condition which the specific medical or surgical treatment was designed to relieve; as applied to examinations, the physical condition prior to the injury will be the condition at time of beginning the physical examination as a result of which the injury was sustained.

B. In determining whether such additional disability results from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such injury or an aggravation of an existing injury suffered as the result of training, or hospitalization, etc., and not merely coincidental therewith.

(2) Compensation under section 213 of the act will not be payable for the continuance or natural

progress of diseases or injuries for which the training, or hospitalization, etc., was authorized.

(3) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from an injury or an aggravation of an existing injury suffered as the result of such training or hospitalization, etc.

(4) The usual after results of approved medical care and treatment properly administered will not be held as entitling to payment of compensation under section 213 of the act.

(5) Compensation under section 213 will not be payable for the residuals of medical care or treatment given outside of a Government hospital or clinic unless such medical care or treatment was specifically authorized under one of the several acts referred to in section 7700, or unless it is held to be adjunct treatment in connection with other treatment specifically authorized.

(6) The claimant's misconduct or failure to follow instructions in connection with training, hospitalization, medical or surgical treatment, or examination will bar him from the receipt of compensation under section 213, except in cases of incompetent claimants.

Sec. 7702. Death compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined that the death is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination. If authoritative medi-

cal opinion is to the effect that death would have been the proximate result of the natural progress of the disease without the treatment given by the United States Veterans' Bureau, or, if medical or surgical treatment was resorted to solely as a last alternative in cases where death is imminent, and death results, such death will not be considered to have resulted from the treatment but from the disease or injury itself.

Sec. 7703. Claims and rating boards in the regional offices will make recommendatory ratings on cases other than death coming under the provisions of section 213 of the World War veterans' act, 1924, as amended. These ratings will be forwarded together with the case file to central office for review and final rating by the rating section, awards division. The final rating and the case file will be returned to the proper regional office and action based thereon will be taken by such office.

* * * * *

4. VA Regulations & Procedure §§ R-1120 through R-1122 (1930) superseded parts of Regulation No. 167, and provided in pertinent part as follows:

Disabilities resulting from training and treatment.

1120. In accordance with the provisions of section 213, World War veterans' act, 1924, as amended, compensation is payable where any beneficiary suffers or has suffered any injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational

rehabilitation act, as amended, the war risk insurance act, as amended, or the World War veterans' act, 1924, as amended, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of the World War veterans' act, as amended, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to, or the death of such beneficiary.

What constitutes such disability.

1121. Disability compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined (1) that there is additional disability, and (2) that such additional disability resulted from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(*a*) The determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under section 213 is based with his subsequent physical condition resulting from such injury. It being determined that there is additional disability and that it is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination, then compensation will be payable only for such additional disability from the date of the receipt of the injury, in accordance with the terms of the

schedule of disability ratings. This comparison will be made separately for each body part involved. As applied to medical or surgical treatment, the physical condition prior to the injury will be the condition which the specific medical or surgical treatment was designed to relieve; as applied to examinations, the physical condition prior to the injury will be the condition at time of beginning the physical examination as a result of which the injury was sustained.

(*b*) In determining whether such additional disability results from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment or examination, the following considerations will govern:

1. It will be necessary to show that the additional disability is actually the result of such injury or an aggravation of an existing injury suffered as the result of training, or hospitalization, etc., and not merely coincidental therewith.

2. Compensation under section 213 of the act will not be payable for the continuance or natural progress of diseases or injuries for which the training, or hospitalization, etc., was authorized.

3. The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from an injury or an aggravation of an existing injury suffered as the result of such training, or hospitalization, etc.

4. The usual after results of approved medical care and treatment properly administered will not

be held as entitling to payment of compensation under section 213 of the act.

5. Compensation under section 213 will not be payable for the residuals of medical care or treatment given outside of a Government hospital or clinic unless such medical care or treatment was specifically authorized under one of the several acts referred to in section 7700, or unless it is held to be adjunct treatment in connection with other treatment specifically authorized.

6. The claimant's misconduct or failure to follow instructions in connection with training, hospitalization, medical or surgical treatment, or examination, will bar him from the receipt of compensation under section 213, except in cases of incompetent claimants.

Death compensation in disabilities resulting from training and treatment.

1122. Death compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined that the death is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination. If authoritative medical opinion is to the effect that death would have been the proximate result of the natural progress of the disease without the treatment given by the United States Veterans' Bureau, or, if medical or surgical treatment was resorted to solely as a last alternative in cases where death is imminent, and death results, such death will not be con-

sidered to have resulted from the treatment but from the disease or injury itself.

APPENDIX B

VETERANS ADMINISTRATION

MEMORANDUM Date OCT 24 1935

From The Solicitor
To The Administrator
Subject Section 31, Public No. 141, 73d Congress

Reference is made to your memorandum of September 4, 1935, transmitting the attached memorandum from the Chairman, Board of Veterans' Appeals, dated September 3, 1935, calling your attention to an apparent conflict in the instructions and precedent decisions issued under and interpreting the provisions of Section 31, Public No. 141, 73d Congress, for "Recd. Confer with Maj Clark."

In his memorandum of September 3, 1935, the Chairman, Board of Veterans' Appeals, invites attention to that portion of R & P, R-1121, promulgated under Section 213 of the World War Veterans' Act, 1924, as amended, which reads:

> "(4) The usual after results of approved medical care and treatmen[illegible]roperly administered will not be held as entitling to payment of compensation under Section 213 of the Act".

and states that under this provision benefits were awarded under Section 213 of the World War Veterans' Act, for *unusual* results of surgical or medical treatment, while the usual after effects were not considered compensable. He also calls attention to Administrator's Decision No. 255, dated August 9, 1934, which holds that compensation under Section

31, Public No. 141, may not be paid "* * * unless it is shown that the death proximately resulted from accident, carelessness, negligence, lack of proper skill, error in judgment, malpractice, etc., on the part of the person, or persons, charged with a duty respecting his hospitalization or treatment". He states that this conclusion was based on a decision rendered by the Comptroller General of the United States on June 18, 1930, placing the same construction on Section 213 of the World War Veterans' Act, and that the decision of the Comptroller General was never promulgated for observation by rating agencies and consequently was not followed in the consideration of claims under Section 213 of the World War Veterans' Act. He also calls attention to Instruction No. 1, Section 31, Title III, Public No. 141, 73d Congress, which provides in part:

> "Initial determinations and adjudicative action in cases coming within the purview of section 31 will be in accordance with the principles and procedure outlined in "R & P R-1121, subparagraphs A and B thereof, 1122, 1123 and R & P 1332 and 1333 * * *"

and states:

> "* * * It will be observed that Instruction No. 1 provides that determinations under Section 31 shall be made in accordance with R & P, R-1121. This appears to be in conflict with Administrator's Decision No. 255 which held in substance that adjudications under Section 31 shall be made in accordance with the ruling laid down by the Comptroller General in his decision of June 18, 1930, which ruling is at variance with R & P, R-1121. Since Administrator's Decision No. 255 has not been rescinded or modified, instructions are desired as to whether the Board of Veterans' Appeals should follow the provisions of Instruction No. 1, Section 31, Public No. 141, and R & P, R-1121, or the provisions of Administrator's Decision No. 255, and the decision of the Comptroller General dated June 18, 1930.
>
> "It might be stated here that the conflict between Administrator's Decision No. 255 and Instruction No. 1, Section 31, Public No. 141, was called to your attention by the Assistant Administrator in charge of pensions in a memorandum dated June 22, 1935, in the case of Roy Bolton, C-360,794."

The inference contained in the memorandum from the Chairman, Board of Veterans' Appeals, dated September 3, 1935, is that Administrator's Decision No. 255 enunciates a new principle, i.e., one which was not followed in adjudications under Section 213, World War Veterans' Act, 1924, as amended, which was in effect revived by Section 31, Public No. 141.

As you no doubt recall, Section 213 was enacted on the recommendation of the Veterans' Bureau, and that in your testimony before the Committee on World War Veterans' Legislation, House of Representatives, which was considering the Bill subsequently enacted as the World War Veterans' Act, you stated in part as follows:

> "This is a new principle but one necessary to the very purpose for which the benefits of these Acts are accorded. * * *
>
> "So also in cases of hospitalization for compensable diseases or injuries, where without fault of

the patient, as the result of accident, or negligence or treatment or unskillfulness - things that must sometimes happen - the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit has, in fact, inflicted a loss.

"It is, therefore, proposed with proper restrictions safeguarding against double payments of compensation, to authorize in such cases an increase of compensation commensurate with the increased disability." (Page 113, Hearings before the Committee on World War Veterans' Legislation, House of Representatives, 68th Congress, 1st Session).

While it is true that in a subsequent discussion reference was made to injuries as the result of operation without neglect, it is evident that the primary purpose of the Veterans' Bureau in recommending this legislation was to authorize the payment of compensation where additional disability results from "accident, or negligence or treatment or unskillfulness".

Shortly after the enactment of the World War Veterans' Act, the Medical Director addressed a memorandum to the then Director of the Veterans' Bureau, calling attention to the outstanding provisions of this new law and requesting an interpretation of these provisions. In this memorandum the following comment was made with reference to Section 213:

"The provisions of Section 213 are clear enough except that the Medical Division will assume that it is not intended to comprehend the natural

progress of an injury or disease within the meaning of this section. That is, it is presumed that additional disability or death within the meaning of Section 213 would logically be based upon some fault or error on the part of the Bureau. Such increased disability as is due to natural progress of a disease would be covered by increased compensation as ordinarily applied by the Bureau." (Memorandum from the Medical Director to the Director, dated June 19, 1924, re: "Interpretations of certain provisions of the Act, Public No. 242, 68th Congress["]).

Apparently the original adjudications under Section 213 were made on the premises that if additional disability resulted from training, hospitalization, or medical or surgical treatment other than through the veteran's own misconduct, compensation was payable under Section 213, irrespective of whether there was any fault on the part of the Bureau personnel. These adjudications were being made in the Field Offices when on March 11, 1926, the Medical Director addressed a memorandum to the then Director, suggesting that the procedure then in effect be amended so as to provide that the files of the cases involving payment under Section 213 be forwarded to Central Office for review and that the opinion of the Medical Service, Central Office, be the guide for the local Regional Offices in awarding compensation in such cases. In this memorandum the Medical Director stated that it was the view of his Office from the beginning that additional compensation would be awarded to such cases only where the additional disability resulted from fault or error on the part of the Bureau, that is, benefits under Section

213 should be awarded on the same ground that juries award their verdicts in malpractice suits. He stated further that where training, hospitalization, medical or surgical treatment or physical examination have been properly conducted, or more specifically, where a medical or surgical procedure which has been applied is one that is in accord with the consensus of medical opinion and the untoward result occurs which can not be attributed to fault or error on the part of a Bureau official, but merely represents the percentage of risk which necessarily inheres in any medical or surgical procedure, then it does not appear that the case is one which would resemble the basis of malpractice suits in Civil courts and is one which could not be compensated under the provisions of Section 213 of the World War Veterans' Act. As an example of a case which should not be compensated under Section 213, the Medical Director cited the following:

> "a retired major in the regular army who, under the provisions of Section 202(10) of the World War Veterans' Act, was admitted to Walter Reed Hospital, where he was operated upon for cancer of the rectum. He recovered from the operation, has gained in weight and health, and undoubtedly his life has been prolonged by the operation. This man concedes that the operation was skilfully performed, but nevertheless he claimed compensation under the provisions of Section 213 of the Act, because he has some slight loss of sphincter control. As a matter of fact, such slight residuals are a necessary result of what is necessarily a very sweeping operation. In this particular case, the Medical Service was of the opinion that the

> claimant had sustained no additional damage which would entitle him to compensation under the terms of Section 213."

The then General Counsel was requested to express his views on this subject, and in an opinion dated April 7, 1926, 36 G.C. 511, addressed to the Assistant Director, Coordination Service, made the following statement:

> "* * * The general theory back of Section 213 of the World War Veterans' Act was to afford relief to those who became injured while undergoing training, hospitalization, medical or surgical treatment, awarded under any of the Acts under which the Bureau operates where, of course, there was no "contributory fault on the part of the beneficiary. So long as a man was properly awarded hospitalization, he would be entitled to compensation for any injury resulting to him from such hospitalization irrespective of the nature of the disability for which he was originally hospitalized. In other words, it was clearly the legislative intent to afford relief to those persons who were lawfully hospitalized who, as a result of such hospitalization, incurred other disabilities *through malpractice, misfeasance or malfeasance of Bureau employees.* * * * It should not, for instance, be applied to a case where a patient is hospitalized with a disability which, according to medical knowledge, is about to be fatal and in which an operation is attempted as a last resort, and which results in death without the misfeasance or malfeasance of the hospital authorities. It was, however, intended to apply to a case where the patient has been lawfully

hospitalized and in the course of his treatment is injured through the *neglect* of the Bureau authorities, as through the administration of a dose of poison instead of medicine by a careless attendant. * * *" (Underscoring supplied).

As a result of this exchange of memoranda the first regulation relative to compensation awards under Section 213 of the World War Veterans' Act, 1924, as amended, was promulgated on June 11, 1926 (Veterans' Bureau Regulation No. 137). This regulation provided that compensation will be paid for the full extent of additional disease or injury which results from "examination or treatment, improperly given". (See 7701, V.B. Regulation No. 137). On September 15, 1926 this section of the regulation was amended so as to authorize the payment of compensation if an additional disease or injury is the result of examination or treatment "where there is satisfactory evidence of malpractice, malfeasance, or misfeasance on the part of the U.S. Veterans' Bureau", (V.B. Regulation No. 157).

Under date of November 11, 1926, Captain Watson B. Miller protested against the provision in the regulation requiring a showing of "malpractice, malfeasance or misfeasance on the part of the United States Veterans' Bureau", contending that this regulation was more restrictive than the law upon which it was predicated.

In a memorandum dated December 7, 1926, the then General Counsel advised you that:

> "* * * The language of the regulation is such that if literally followed it may bring about results more restrictive than the language of the statute warrants. At the time the Regulation was issued,

> however, it was felt that the language should be strictly drawn, as prior thereto "the statute itself was being applied indiscriminately.
>
> "Actual experience has demonstrated that through literal application of the Regulation hardship has been worked in meritorious cases. It is the opinion of this Office that the wording of the Regulation should now be changed. It is suggested therefore that a conference be called with representatives of this Office, the Medical Director, and Coordination Service present for the purpose of redrafting the Regulation."

This suggestion was approved and a conference was held, as a result of which the regulations on this subject were again amended by Regulation No. 167, Section 7701 of which provides:

> "Disability compensation under Section 213, World War Veterans' Act, 1924, as amended, will be payable only when it is determined (1) that there is additional disability, and (2) that such additional disability resulted from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.
>
> "A. The determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under Section 213 is based with his subsequent physical condition resulting from such injury. It being determined that there is additional disability and that it is the result of an injury or an aggravation of an existing injury suffered as the

result of training, hospitalization, medical or surgical treatment, or examination, then compensation will be payable only for such additional disability from the date of the receipt of the injury, in accordance with the terms of the Schedule of Disability Ratings. This comparison will be made separately for each body part involved. As applied to medical or surgical treatment, the physical condition prior to the injury will be the condition which the specific medical or surgical treatment was designed to relieve; as applied to examinations, the physical condition prior to the injury will be the condition at time of beginning the physical examination as a result of which the injury was sustained.

"B. In determining whether such additional disability results from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment or examination, the following considerations will govern:

"1. It will be necessary to show that the additional disability is actually the result of such injury or an aggravation of an existing injury suffered as the result of training, or hospitalization, etc., and not merely coincidental therewith.

"2. Compensation under Section 213 of the Act will not be payable for the continuance or natural progress of diseases or injuries for which the training, or hospitalization, etc., was authorized.

"3. The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from an injury or an aggravation of an existing injury suffered as the result of such training, or hospitalization, etc.

"4. The usual after results of approved medical care and treatment properly administered will not be held as entitling to payment of compensation under Section 213 of the Act.

"5. Compensation under Section 213 will not be payable for the residuals of medical care or treatment given outside of a government hospital or clinic unless such medical care or treatment was specifically authorized under one of the several acts referred to in Section 7700, or unless it is held to be adjunct treatment in connection with other treatment specifically authorized.

"6. The claimant's misconduct or failure to follow instructions in connection with training, hospitalization, medical or surgical treatment, or examination will bar him from the receipt of compensation under Section 213, except in cases of incompetent claimants."
(This section is now incorporated into R & P, as Paragraph R-1121).

While the language of the regulation quoted above might afford some basis for assuming that compensation would be payable for a disability resulting from the unusual after results of approved medical care and treatment properly administered, in the absence of fault on the part of Veterans' Administration employ-

ees such an assumption can not be justified when the language is considered in the light of the opinions rendered subsequent to the promulgation of Veterans Bureau Regulation No. 167.

In an opinion dated March 10, 1927, in the case of Thomas B. Bowser, C-1,171,781, the then General Counsel in response to an inquiry from the Director as to whether there was authority to authorize compensation because of increased disability which the veteran suffered as a result of hospitalization, stated:

> "Taking into consideration all the facts in this case, I am of the opinion that if you find the claimant's present condition is the result of the action of the Bureau in removing this man from the hospital before a sufficient time had elapsed following the operation, and I recommend that you so find, compensation for his present disability will be payable under Section 213."

It will be noted that in the Bowser case the opinion was predicated on the fact that the Bureau employees were at fault in removing the man from the hospital before a sufficient time had elapsed following the operation.

n an opinion dated February 27, 1928, 50 G.C. 439, in the case of Frank McKeown, C-1,082,875, the following statement was made:

> "* * * It is apparent from the facts in this case that this veteran by reason of his hospitalization was unnecessarily placed in a position of peculiar danger and allowed to remain there, *evidently through the fault of authorities in charge of the hospital.* It is also apparent that there was a causative connection between this claimant's

> hospitalization and the injury suffered. Therefore, it is the opinion of this Service that a permanent rating should be given for this disability, as a matter of record, even though it will not affect the amount of compensation now being paid. * * *" (Underscoring supplied).

It will be noted that here again the conclusion is predicated on the fact that there was fault on the part of the Bureau employees.

In a decision dated June 18, 1930, (9 Comp. Gen. 515) the Comptroller General stated:

> "The plain intent of section 213 of the statute, amended, as above quoted, by the act of March 4, 1925, 43 Statute 1308, was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment pursuant to an award under either of the acts therein mentioned. * * *"

In an opinion dated December 27, 1930, 65 G.C. 429, in the case of William L. Concannon, XC-418,789, the then General Counsel, after quoting Paragraph R-1121 of Regulations and Procedure, including subparagraph (B) 4 thereof, stated:

> "* * * it is the opinion of this Service that the benefits provided by Section 213 of the World War Veterans' Act, as amended, may be awarded in this case, if the disability causing the death *proximately resulted through carelessness, accident, negligence, lack of proper skill, error in*

judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered and provided, of course, the other requirements of the Section have been met." (Underscoring supplied)

It will be noted from the foregoing that the decision of the Comptroller General is not in conflict with, but rather in conformity with the opinions of the then General Counsel to the effect that disabilities resulting from unusual after effects of *properly* administered care or treatment are not compensable in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, et cetera, and that the principle enunciated in Administrator's Decision No. 255 is not a new one, but is merely a restatement of the former conclusions.

In view of the foregoing, it is my opinion that the proper construction to be placed on R & P R-1121 (B) 4 is that neither the usual nor unusual after results of approved medical care and treatment properly administered will be held as entitling to payment of compensation under Section 213 of the Act or Section 31, Public No. 141, in the absence of a showing that the disability proximately resulted from accident, carelessness, negligence, lack of proper skill, error in judgment, malpractice, et cetera, on the part of the person or persons charged with a duty respecting hospitalization or treatment of the veteran.

The question as to whether compensation may be awarded in a case in which a rating granting service connection was rendered on the theory that the

regulations and precedents did not require a showing of accident, carelessness, negligence, lack of proper skill, error in judgment, et cetera, where the resultant condition was an unusual after result, so-called, was considered in connection with the case of Ramon J. Rodriguez, XC-661, 161.

In the Rodriguez case a rating was made in 1927 to the effect that the death was compensable under Section 213. In a memorandum dated December 10, 1934, the Medical Director stated that in his opinion the death of the veteran did not result from carelessness, negligence, lack of proper skill, or error in judgment, and that the death should not be considered as an accident in the sense that the immediate hospital environment or forces working therein, were responsible for the death. In view of this holding, I advised you under date of December 13, 1934, that the proposed retroactive payment of compensation under Section 213, World War Veterans' Act, 1924, as amended, and Paragraph 2, Section 20, Public No. 78, be denied. This recommendation was approved by you on December 14, 1934. In the memorandum of September 3, 1935, the Chairman, Board of Veterans' Appeals, states that the recommendation of Major Clark in the case of Roy Bolton, C-360,794, was predicated on an alleged conflict between Administrator's Decision No. 255 and Instruction No. 1, Section 30, Public No. 141, 73d Congress. In the Bolton case the veteran was operated on at the Facility Muskogee, Oklahoma, for discharging fistula in ano on February 24, 1932. The operation was performed under local anesthesia and at that time the fistula was dissected and the sphincter muscle was severed. He was discharged on March 25, 1932, with maximum benefit received from hospitalization. The

Assistant Administrator, Major Clark, recommended payment for the disability incurred as a result of this hospitalization on the theory that it was not *the usual after results* of approved medical care and treatment, citing in support thereof R & P R-1121 (B) 4. The case was studied by the Medical Director and the Consultants in Surgery and Gastroenterology at the Diagnostic Center, Washington, D.C. It was the opinion of the Consultants, which was concurred in by the Medical Director, that the disturbance of sphincter control is not the result of malpractice, accident, carelessness, negligence or lack of judgment and proper skill on the part of the operating Surgeon, but that the present rectal pathology is the result of the pathological process and the sequelae of properly performed operative therapy.

In a memorandum dated July 3, 1935, Assistant Administrator, Colonel Ijams, expressed the opinion that if cases of this kind are to be considered with justice from a medical standpoint, a distinction must be made between the result of acceptable practice and the result of malpractice, stating in part:

> "Many times the surgeon is confronted with the necessity of defacing and destroying tissue in an effort to save or prolong life. Frequently, in operations for malignancy of the rectum, it is necessary to destroy much tissue, including that of the sphincter, in order to reach invaded areas. Many times, as in the case under reference, it is necessary to divide the sphincter in whole, or in part, for the cure of fistula in ano and the results are the sequelae of properly performed operative therapy. Such results are not the 'usual' results of uncomplicated operation, nor are they the

> 'unusual' results of a well performed surgical procedure.
>
> "Surgery is attended by certain hazards which must be considered to be within the limits of good practice and our surgeons might as well discontinue operating as to deny this fact. To compensate beneficiaries for such hazards, which are willingly accepted by patients of surgeons in private practice, does not appear fair or just from the standpoint of medical practice, and does not in any way conform to the "civil laws with reference to malpractice. The interpretation of the law which the Assistant Administrator proposes amounts to a guarantee that the surgical operation will be successful in every way. Such a guarantee is opposed to medical ethics and is one which no reputable surgeon would offer. * * *"

In a memorandum addressed to Colonel Ijams under date of July 5, 1935, you advised him that you desired a more full discussion of the merits of the case rather than on the general question involved and:

> "It is not my understanding that the present law requires the claimant to go so far as to show malpractice. I can readily understand that even with full regard to the hazards of surgery, certain conditions may develop which would bring the case under the law, because of accident or otherwise, which bring about results that are not the ordinary or those normally expected."

I concur with your view that the law does not require the claimant to go so far as to show malpractice but, as indicated above, it is my opinion that there must be more than a mere showing that the disability resulted

from other than the usual after results of approved medical care and treatment properly administered. There must be a showing of accident, carelessness, negligence, lack of proper skill, error in judgment, et cetera, on the part of the person or persons charged with the duty respecting hospitalization or medical or surgical treatment.

In this connection I deem it not improper to point out that these restrictions are limited to those cases in which the veteran is, or was receiving medical care or treatment for a non service connected disability. If the veteran is, or was receiving medical care or treatment for a service connected disability, any disability proximately resulting from such treatment, be it the usual or unusual after results, is compensable in the same manner as is the service connected disability.

After a careful consideration of the entire matter, it is my recommendation that the Chairman, Board of Veterans' Appeals, be advised that the proper construction to be placed upon R & P R-1121 (B) 4, and Instruction No. 1, Section 31, Title III, Public No. 141, 73d Congress, is as indicated above, i.e., neither the usual nor the unusual after results of approved medical care and treatment properly administered will be held as entitling to payment of compensation under Section 213, World War Veterans' Act, or Section 31, Public No. 141, 73d Congress, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, et cetera. Under such a construction there will be no conflict between Administrator's Decision No. 255 and Instruction No. 1, Section 31, supra.

In concluding this memorandum, I feel that the rating authorities should be instructed that in applying the rule laid down herein to an individual case a considerable degree of liberality should be exercised in evaluating the facts for the purpose of determining whether the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, et cetera. It is safe to assume that one surgeon will be quite hesitant in saying that another surgeon did not perform an operation properly or with due care unless the facts are such as to put the matter beyond peradventure of a doubt. Because of this fact any strict application to the rule above referred to might in many instances operate to defeat the purpose for which the section (Section 31, Public No. 141, 73d Congress) was enacted, whereas if the rule is liberally construed in individual cases, and the veteran is given the benefit of any doubt in determining whether the disability proximately resulted from fault on the part of the Veterans' Administration employees, the cases which were intended to be encompassed in the Act will be taken care of. If you approve this memorandum, further consideration should be accorded the Bolton case in the light of the principles here set forth.

/s/ James T. Brady
JAMES T. BRADY.

Att.
File att.